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No. 90-1598

In the Supreme Court of the United States

OCTOBER TERM, 1991

LAWRENCE J. KORB, PETITIONER

v.

JOHN F. LEHMAN, JR., MELVYN R. PAISLEY, EVERETT PYATT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT EVERETT PYATT IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly dismissed petitioner's *Bivens* action.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-24a, 25a-26a, 27a-28a) is reported at 919 F.2d 243. The opinion of the district court (Pet. App. 29a-54a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1990. On February 15 and April 15, 1991, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including April 15, 1991. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In early 1986, petitioner was a vice president of Raytheon Corporation. Petitioner ran the firm's Washington, D.C., office, and was responsible for corporate relations with, among other entities, Congress and the Department of Defense. Before joining Raytheon, petitioner served four years as the Assistant Secretary of Defense for Manpower, Installations, and Logistics. Pet. App. 2a.

On February 25, 1986, petitioner spoke at a press conference held by the Committee for National Security—"a group of private citizens organized to encourage informed debate about national security issues." Pet. App. 2a. The news conference—reported by *The Washington Post* and local news media—announced the Committee's publication of an "alternative defense budget." *Id.* at 3a. According to published reports, petitioner advocated reducing the President's five-year defense budget by $200 billion and scaling back the planned 600-ship, 15-carrier Navy fleet. *Ibid.* The *Post* article, "entitled 'Pentagon Ex-Defender Turns Critic[,]' identified [petitioner] as 'a private citizen working for arms-maker Raytheon Co.'" *Id.* at 4a (footnote omitted).

Respondent, Secretary of the Navy John F. Lehman, Jr., talked about petitioner's press conference at his regular staff meeting the next morning. Respondents Melvin R. Paisley and Everett Pyatt, Assistant Secretaries of the Navy, attended the meeting. At that meeting, Lehman "expressed his indignation about [petitioner's] remarks and his belief that a company under contract to the Navy might be advancing programs that would seriously impair national defense." Pet. App. 4a. Meanwhile, at Raytheon, "[s]everal executives felt that the statements attributed to [petitioner] were not appropriate for a Raytheon employee and that the company would be inexorably associated with the well-publicized views of [petitioner]." *Id.* at 5a.

After the staff meeting, Paisley and Pyatt – on their own initiatives – telephoned Raytheon senior executives. Paisley called R. Gene Shelley and criticized petitioner, "averring that a Raytheon official ought to be careful about talking in a public forum because of the possibility of inaccurate reporting." Pet. App. 6a. Pyatt telephoned Dennis Picard and objected to petitioner's contention that a 600-ship Navy could be abandoned without affecting the security of the United States.

At no time did Lehman, Paisley, or Pyatt suggest to Raytheon executives that they should take any personnel action against petitioner. Nor did respondents threaten to take any steps against Raytheon. Nonetheless, "[i]n the months preceding [petitioner's] news conference, both [Philip Phalon] and several other high-ranking Raytheon officials had become increasingly dissatisfied with the way in which [petitioner] performed his job." Pet. App. 8a.[1] Phalon was also particularly angered by a network evening news program – taped, as Phalon recognized, in Raytheon's Washington, D.C., office – in which petitioner criticized the yet to be announced defense budget before the news conference of February 25. *Id.* at 8a-9a.

By mid-March 1986, after consulting with other Raytheon executives, Phalon made an initial decision to fire petitioner. According to Phalon, petitioner's "departure from [Raytheon was] part of a continuum. It was not triggered by Navy calls. Nor [were such calls] a decisive moment in time for Dr. [Korb] and his relationship with Raytheon Company." Pet. App. 9a (brackets in original). Upon hearing reports that petitioner might lose his job, Lehman spoke with J. Brainard Holmes, Raytheon's president. Lehman assured Holmes that "the Navy could continue to work with

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[1] Phalon, who was petitioner's principal supervisor, was largely responsible for hiring him. Pet. App. 8a.

[petitioner] and * * * urge[d] Holmes to reconsider the decision to dismiss [petitioner]." *Id.* at 10a. Holmes, who had also been dissatisfied with petitioner's job performance, explained to Lehman that "Raytheon would take the Secretary's views into consideration, but that a decision based upon [petitioner's] entire employment record would be made." *Ibid.* Raytheon ultimately offered petitioner another job in Philadelphia, instead of firing him outright. Petitioner rejected the offer and left the company. *Id.* at 10a-11a.

Meanwhile, the Office of the Inspector General, Department of Defense—at Congress's request—investigated the entire episode. The investigation determined that "there was no evidence to suggest that Navy officials either requested or intended that [petitioner] be fired." Pet. App. 11a. According to the Inspector General's final report, petitioner's

> departure from Raytheon was not solely attributable to the complaints by Paisley and Pyatt, but rather to a combination of factors that included the complaints of the Navy officials, as well as complaints from a staff Member of the Senate Armed Services Committee, Carl M. Smith, and other Raytheon executives.

Ibid.

2. In February 1988, petitioner brought this federal court action against respondents Lehman, Paisley, and Pyatt, claiming that each individual—by his contacts with Raytheon—"intended to * * * penalize [petitioner] for exercising the right of free speech guaranteed to him by the First Amendment [to] the Constitution of the United States, and otherwise intended to * * * deprive [petitioner] of that right." Pet. App. 68a. Petitioner sought compensatory and punitive damages. *Id.* at 69a.

Respondents thereafter filed a motion to dismiss or in the alternative for summary judgment. Respondents con-

tended that petitioner's factual allegations, even if true, did not make out a violation of the First Amendment, because "the essential element of government action is missing from [those] allegations." Resp. Mem. in Support of Mot. to Dis. 14, *Korb* v. *Lehman*, No. 88-0207-A (E.D. Va.) (filed June 17, 1988).[2] Respondents also asserted the defense of qualified immunity, contending that petitioner's allegations did not state a violation of any "clearly established" constitutional right within the meaning of *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). Resp. Mem. in Support of Mot. to Dis. 16-23, *Korb* v. *Lehman*, *supra*.

3. In July 1988, the district court granted respondents' motion and dismissed petitioner's complaint. Pet. App. 29a-54a, 55a. The court first determined that petitioner "does not and cannot allege that [respondents] controlled Raytheon's personnel decisions or compelled [petitioner's] reassignment or termination." *Id.* at 42a. The court therefore concluded that, since "the essential element of government action is missing from [petitioner's] allegations," "there can be no constitutional cause of action for damages upon which relief can be granted." *Id.* at 42a-43a.

The court next considered whether respondents "reasonably could have believed that their alleged conduct was consistent with [petitioner's] first amendment rights." Pet. App. 48a (citing *Anderson* v. *Creighton*, 483 U.S. 635 (1987)). The court pointed out that petitioner

> cites no statute or regulation in effect at the time that made it improper for Secretary Lehman to criticize [petitioner] at a staff meeting, or for the other

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[2] Moreover, respondents argued that even if the complaint were read as alleging a "sufficient nexus between state action and [petitioner's] alleged injury, * * * this is not an appropriate case for recognizing an implied cause of action under the first amendment." Resp. Mem. in Support of Mot. to Dis. 14, *Korb* v. *Lehman*, *supra*.

> [respondents] to express their opinions to a defense contractor about the views or conduct of one of the contractor's employees. Similarly, no policy or other internal directive of the Navy or [Department of Defense] barred or circumscribed [respondents'] discretion in this regard.

Pet. App. 49a-50a. In fact, the court noted, *Donohoe* v. *Watt*, 546 F. Supp. 753 (D.D.C. 1982), aff'd mem., 713 F.2d 864 (D.C. Cir. 1983), "had held that conduct like that engaged in by [respondents] did not violate clearly established rights." Pet. App. 50a. Accordingly, the court held that petitioner's "allegations fail to state a claim of violation of clearly established law, and [respondents] are * * * protected by qualified immunity." *Id.* at 50a-51a.

Finally, the court concluded that the "record * * * demonstrates that [respondents'] conduct was not the proximate cause of [petitioner's] injury." Pet. App. 51a. In the court's view, "there is no evidence that [respondents] threatened or coerced Raytheon to induce the company to silence or remove [petitioner], and no causal link between [respondents'] conduct and [petitioner's] termination." *Id.* at 53a.

4. The court of appeals affirmed. Pet. App. 1a-24a. As the court recognized,

> [t]he central question in determining the issue of qualified immunity is whether or not the conduct of the government official violated "clearly established law," *i.e.*, the "objective legal reasonableness" of [his] action . . . assessed in light of the legal rules that were "clearly established" at the time it was taken. . . .

Id. at 16a (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987)). After reviewing pertinent case law, the court determined "that at the time the conduct alleged in the complaint occurred, there was no law declaring that such con-

duct might give rise to a constitutional violation. In fact, the contrary was indicated." Pet. App. 23a (citing *Donohoe* v. *Watt*, *supra*). The court therefore held respondents "did not violate 'clearly established' law and were thus protected from suit by qualified immunity." *Ibid.*

Judge Sprouse dissented, "feeling that [respondents] are not entitled to qualified immunity under *Harlow* v. *Fitzgerald*, 457 U.S. 800, and *Anderson* v. *Creighton*, 483 U.S. 635." Pet. App. 24a.

ARGUMENT

Petitioner contends (Pet. 18-26) that the courts below erred in dismissing his *Bivens* action on grounds of qualified immunity, because respondents' challenged conduct—as of 1986—plainly infringed his First Amendment rights. In petitioner's view, since "[t]his Court has repeatedly made clear that * * * official retaliation directed at speech on a matter of public concern violates the First Amendment unless there is a compelling governmental justification for such action unrelated to the speech," Pet. 19 (citing cases), "a private individual's First Amendment right to be free of official retaliation for speaking out on matters of public concern * * * is a clearly established right as that term is used in *Harlow* and *Anderson* v. *Creighton*," Pet. 20.

1. At the outset, this case is not an appropriate vehicle for addressing the substantive issue petitioner presents. The district court determined that

> [t]he record * * * demonstrates that [respondents'] conduct was not the proximate cause of [petitioner's] injury. Assistant Secretaries Paisley and Pyatt did not expressly or implicitly ask that [petitioner] be silenced or terminated when they telephoned their contracts [sic] at Raytheon. They did not make statements that were expressly or implicitly threatening, and the Raytheon

> officials did not perceive their calls to be coercive or intimidating. Furthermore, Secretary Lehman neither directed his assistant secretaries to make those calls, nor told them what to say.

Pet. App. 51a; see *id.* at 42a. The court of appeals similarly found that

> [respondent] Pyatt did not demand, request, or suggest that Raytheon take any personnel action regarding [petitioner]. Nor does the record * * * reflect that Pyatt attempted to intimidate, coerce, or threaten Picard or Raytheon in any way.

Id. at 7a; see *id.* at 4a (respondent Lehman's conduct); *id.* at 6a (respondent Paisley's conduct). As the courts below specifically found, the record here does not at all support petitioner's allegation that respondents made any threat of retaliation. Since petitioner has offered no reason for the Court to deviate here from its general practice of declining to review factual findings concurred in by both lower courts, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 318 n.5 (1985); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967), further review of the substantive issue petitioner presents would be inappropriate.

2. In any event, petitioner's contention rests on a misreading of *Anderson* v. *Creighton*, *supra*. There, this Court stated that—for purposes of the qualified immunity doctrine—"the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." 483 U.S. at 640. Indeed, in *Anderson*, this Court rejected the sort of generality argument petitioner raises here. In defining the level at which "the test of 'clearly established' [is] to be

applied," *id.* at 639, the Court refused to adopt an analogous standard by which "any action that violates [the Due Process] Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right," *ibid.*[3]

Here, as the court of appeals pointed out, the challenged conduct at issue involved respondents'

> contact with officials of [petitioner's] employer in order to express their displeasure with and criticism of [petitioner] for his *public* critical comments regarding the proposed Department of Defense budget and allegedly to cause his employer to fire him for making such comments.

Pet. App. 18a (emphasis in original). In *Donohoe* v. *Watt*, 546 F. Supp. 753 (D.D.C. 1982), aff'd mem., 713 F.2d 864 (D.C. Cir. 1983), however, the court had determined that "a cabinet officer (and at least his immediate subordinates) must be able to communicate freely with enterprises having business with the department, including the right to offer adverse commentary upon the integrity, competence, judgment, or discretion of their representatives." 546 F. Supp. at 756. The court therefore held that a private sector employee's First Amendment right—to criticize government officials without suffering adverse employment consequences—"is not so clearly established as to overcome the [government official's] defense of immunity." *Ibid.*

In light of *Donohoe*, the courts below correctly held that petitioner's particular *Bivens* action foundered on the governing standard for qualified immunity set forth in

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[3] Petitioner's suggestion (Pet. 23-28) that First Amendment rights demand a special test of specificity may not be squared with *Anderson* v. *Creighton*, 483 U.S. at 639.

Anderson. Accordingly, further review of the issue petitioner purports to present is not warranted.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner suggests that the court of appeals held that "a qualified immunity defense is appropriate in constitutional cases unless 'the very action in question has previously been held unlawful.'" Pet. 23 (quoting *Anderson* v. *Creighton*, 483 U.S. at 640). But the court adopted no such holding. See Pet. App. 16a-17a.

Finally, petitioner seeks this Court's review (Pet. 28-30) in order to clarify the scope of the substantive First Amendment issue at stake in this sort of case. As respondent Lehman points out (Br. in Opp. 16-17), petitioner's request for what would amount to an advisory opinion is inappropriate.

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